No. 91-2001

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL

Petitioner,

vs.

CITY OF CINCINNATI,
SCOTT JOHNSON, CITY MANAGER,
CIVIL SERVICE COMMISSION
OF THE CITY OF CINCINNATI,
LAWRENCE WHALEN,
POLICE CHIEF OF THE CITY OF CINCINNATI
and
THE SENTINEL POLICE ASSOCIATION

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY TO BRIEFS OF RESPONDENTS CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, LAWRENCE WHALEN AND THE SENTINEL POLICE ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When no hiring or promotional quota is authorized by a voluntary consent decree entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitutional permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

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Respondents' briefs raise a number of arguments as to why the legal issues raised by Petitioner in support of his Writ of Certiorari are not sufficiently novel to warrant

Supreme Court consideration. Petitioner shall briefly address and respond to each of these arguments in turn.

I. In denying that a quota system has been instituted in order to fulfill the goals of the consent decree, Respondents are engaged in semantics. The City's own officials verified that the goals of the consent decree were implemented by a quota system. In the deposition of Scott Johnson, the City Manager of the City of Cincinnati, the following exchange took place.

> Q. Would it be correct to say that prior to hiring a class, specific percentages of white males, black males, and females are predetermined?
>
> A. Yes.

(Deposition of Scott Johnson page 22, Petitioner Appendix 1A).

Note also the deposition testimony of Carol Callahan, the Senior Personnel Analyst for the City.

> Q. How is it then determined how many white males, black males and females would be in the class?
>
> A. The percentages is (sic) as outlined in this consent decree. It is 34% black, 23% female.
>
> . . .
>
> Q. Now, would it be correct then to presume that in this particular class, 34% were black and 23% were female?
>
> A. Correct.

(Deposition of Carol Callahan, pages 20-21, Petitioner Appendix 2A-3A).

Both the City Manager and the Senior Personnel Analyst agree that the recruit lists are divided into a white male list, a black male list and a female list. They also agree that the percentages taken from those lists are without regard to the individual score, when compared to individuals on the other lists.

Respondent City's minimization of the written examination as merely one portion of the selection process is merely a smokescreen. It is the written examination scores which determine an individual's rank on the eligible list. And this list ultimately determines the order in which such individuals are certified to the police chief for hiring consideration.

There is also no support for Respondents' claim that the examination tests "minimum" qualifications. Quite the contrary, Ohio Revised Code § 124.26 clearly states that the ranking in order of excellence, based upon test score, is the determining factor as to who is to be certified for hiring consideration.

In sum, Respondent City has not set up mere "goals" for hiring blacks and females. It has set aside an inflexible predetermined number of slots in the police recruit class for minority and female individuals. This is no less a set-aside or quota than the set-asides and quotas condemned by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).[1]

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[1] Respondent Sentinel Police Association concedes the point when it characterizes the City's hiring scheme as "a practice of granting preferences . . . to . . . blacks and women." (Brief of Respondent Police Sentinels at 4).

II. One of the key issues upon which Petitioner seeks a Writ of Certiorari is the proper methodology for establishing past discrimination by a municipal entity which would justify the imposition of race-conscious relief. Petitioner argues for a comparison of the percentage of minorities in the at-issue skilled jobs with the percentage of minorities in a *qualified* labor pool. On the other hand, Respondents City and Police Sentinels argue – and the Sixth Circuit held – that the percentage of blacks and females in the at-issue jobs may be compared with the percentage of black and female *applicants* for those jobs.

As if to trivialize Petitioner's petition, Respondent Police Sentinels downplay this issue as a mere "fact oriented issue" (Respondent Police Sentinel's Brief at 10). Nothing could be further from the truth. The proper formula for analyzing race and sex-based statistics is of paramount concern for all public employers in crafting their hiring and promotional policies. The correct methodology for utilizing statistics also forms an indispensable guideline for public employees and prospective public employees in determining whether discrimination has occurred and how they must go about proving it. The proper use of statistics has provided grist for countless Supreme Court decisions in this area over the past several years. *See, e.g., Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989); *Hazelwood School District v. United States,* 433 U.S. 299 (1977). *Casteneda v. Partida,* 430 U.S. 482 (1977). Thus, in the instant case, whether the City of Cincinnati can justify the composition of its police recruit class by comparing it to the racial and sexual configuration of its applicant pool, as opposed to a pool of qualified candidates, for the position of police recruit is clearly a

question of law. Important constitutional rights of both minority and non-minority recruit candidates as well the integrity of the City's hiring policies turn on the resolution of this altogether crucial issue.

Respondent Police Sentinel's citation of *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989) as authority for the City's reliance on "applicant flow" statistics is unwarranted. At no time does the Court endorse reliance on mere "applicant flow". Rather, *Wards Cove* is replete with admonitions that discrimination through statistics can only be shown by comparing the percentage of minorities in the at-issue jobs with the percentage of minorities in a qualified labor pool. *See also Hazelwood School District v. United States,* 433 U.S. at 308 n. 13. It is not hard to envision why "applicant flow" would be an unreliable comparison when the at-issue jobs are skilled. Anybody can apply for a skilled job. In any given year, a disproportionate number of unqualified individuals might apply from any minority or ethnic group. To force a city to thus construct its recruit class according to the percentage of minorities in such an applicant pool would not serve the public interest.

III. As was fully argued in Petitioner's Petition for Writ of Certiorari, the Supreme Court has yet to address the constitutionality of public sector affirmative action programs in the context of hiring of applicants for public employment. Respondent Police Sentinels correctly cites the several seminal decisions recently handed down by the Supreme Court in the area of affirmative action. Yet it offers no explanation of its curious and self-serving remark that "no new case law is needed in this area". (Respondent Police Sentinel's brief at 7.)

In any event, this court has not handed down any significant ruling in the area of affirmative action since it struck down racial set-asides three years ago in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Since that time the Sixth, Seventh and Eighth Circuits have addressed the issue of affirmative action in the hiring context, and have upheld affirmative action plans which contain predetermined racial and sexual set-asides in entry level recruit classes. However, notwithstanding arguments by the Respondent Police Sentinels to the contrary, *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) does represent an inclination by the Eleventh Circuit to go the other way. In *Peightal* the Court ruled that such racial set-asides raised serious issues of Fourteenth Amendment deprivation. The time is thus ripe for this Court to establish guidelines as to when hiring quotas and set-asides pass constitutional muster.

Respondent Police Sentinels' reliance on *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), underscores further the need for Supreme Court elucidation in this area of the law. Respondent argues that *Wygant* gives public employers *carte blanche* authority to implement hiring quotas. (Respondent Police Sentinels' Brief at 14-15.) However, *Wygant* never went that far. It merely contains *dicta* to the effect that candidates for public employment may enjoy a lesser degree of constitutional protection than do incumbent public employees. The Court never defined "lesser degree". It did not describe the extent to which the "strict scrutiny" standard should be relaxed in the case of applicants for public employment. *City of Richmond v. J.A. Croson Co.*, which, like this

case, involves an application by outsiders for governmental benefits (a public contract rather than public employment), strongly suggests no relaxation at all. This is precisely why this case is an ideal vehicle for the Supreme Court to provide valuable guidance to both public employers and applicants for public employment.

IV. Respondents argue that the "standing" issue raised in the Petition for Writ of Certiorari is not worthy of Supreme Court review inasmuch as *Martin v. Wilks*, 490 U.S. 755 (1989) has been somehow vitiated by Section 108 of the Civil Rights Act of 1991. However, Section 108 only applies to the right of non-parties to challenge decrees as violative of that statute. It does not, and can not, speak to the right of individuals to raise *constitutional* challenges to consent decrees to which they were not a party.

Furthermore, Respondent Police Sentinels incorrectly characterizes the "standing" issue as the right of a non party to *interpret* a consent decree as opposed to the right of a non party to *challenge* the constitutionality of a consent decree, the latter which Respondents concede. However, this case really does not involve consent decree interpretation at all. The challenged quotas themselves were outside the four corners of the consent decree. The implementation of a black list, a female list and a white list and the taking of a predetermined number of individuals from each list, was never provided for in the decree. Petitioner is in reality challenging the constitutionality of personnel policies undertaken by the City which are apart from and independent of the consent decree. No interpretation of existing decree language is implicated.

V. In a last ditch effort to downplay the constitutional importance of the issues raised by Petitioner, Respondents argue that the rights of "only" one individual are at stake. However, cases should not be deemed less worthy for Supreme Court review merely because only one individual has been deprived of important constitutional rights. The fact that one non-minority applicant sued for denial of a place in a medical school class did not dissuade the Supreme Court from ruling in *Board of Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that his Fourteenth Amendment rights had been violated. Indeed, the annals of Supreme Court decisions contain numerous cases in which the Court has broken new ground in the area of constitutional law where only one individual was injured. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Equally troubling is Respondent Police Sentinels' argument that this case is not worthy of Supreme Court review because the Petitioner ultimately obtained a position in a subsequent recruit class. Respondent Police Sentinels would have this court ignore the injury Petitioner has suffered by being deprived of his rightful place in the first recruit class. For the remainder of his career in the Police Division, Petitioner will be irreparably harmed. He will always possess less seniority than he would have had if he had been admitted into the first recruit class. Thus Petitioner will be more vulnerable to lay off, and will also lag behind his peers in the first recruit class in the accumulation of on-the-job experience, which is so necessary to achieve promotion to a higher rank.

In sum, the Supreme Court should grant Petitioner a Writ of Certiorari. Respondents have advanced no cogent

argument as to why the case should not be accepted for Supreme Court consideration.

Respectfully submitted,

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DEPOSITION OF SCOTT JOHNSON

* * *

[p. 22] would that help you?

A First paragraph on page two?

Q On page three, the beginning of section number two. The first paragraph of section number two on page three.

A No.

Q There's no date indicated?

A I see no date in the first paragraph of page three.

Q And do you know if a date is indicated anywhere within this document?

A No.

Q Therefore, once again in terms of meeting the goal that you talk about how are the percentages of each class determined?

MR. GERHARDSTEIN: Objection. Asked and answered.

BY MR. WYLER:

Q Go ahead.

A I don't know.

Q Would it be correct to say that prior to hiring a class, specific percentages of white males, black males, and females are predetermined?

A Yes.

Q Would you please point out to me in the

* * *

DEPOSITION OF CAROL CALLAHAN

* * *

[p. 20] Q And you're familiar with the consent decree?

A Right.

Q Would you point out to me the place in the consent decree that authorizes dividing the lists by race and sex?

A I don't believe there is any place in the consent decree where it speaks to the list, one list or three.

Q Once it is determined – let us take 89-01 as an example, since it's the key class for this litigation – once it was determined the number to be in that class, which I believe was 50; is that correct?

A Yes.

Q How is it then determined how many white males, black males and females would be in the class?

A The percentages is as outlined in this consent decree. It's 34 percent black, 23 percent female.

Q Would you show me that in the consent decree? What page are you on?

A Three.

Q Now, would it be correct then to presume that in this particular class, 34 percent were [p. 21] black and 23 percent were female?

A Correct.

Q Would that be true – how many classes have there been since this class? Any? This is the last class?

A There's a class right now.

Q Right. And the class that is going right now, are the percentages the same?

A No.

Q Why not?

A Because this is a goal for us. We could not meet our goal for the second class, so we went with the remaining individuals on the list.

Q Now, the class before that in 19___ whatever class came immediately before 89-01. Do you know the proportions in that?

A No, I really don't. I could look that up for you, but I'd hate to say it from memory.

Q Would it be correct to state that on the present class that the percentages are different because you simply ran out of the list?

A Right.

Q Of which? Females or black males, or white males?

A Of blacks.

* * *